Supreme Court, U.S.
FILED
JUN 12 2017
OFFICE OF THE CLERK

No. 16-1362

In the
Supreme Court of the United States

ENCINO MOTORCARS, LLC,
Petitioner,

v.

HECTOR NAVARRO, MIKE SHIRINIAN, ANTHONY PINKINS, KEVIN MALONE, REUBEN CASTRO,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR AMICI CURIAE NATIONAL AUTOMOBILE DEALERS ASSOCIATION AND STATE AUTOMOBILE DEALERS ASSOCIATIONS FOR ALASKA, ARIZONA, CALIFORNIA, HAWAII, IDAHO, MONTANA, NEVADA, OREGON AND WASHINGTON STATE IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether "service advisors" at automobile and truck dealerships are exempt from the overtime pay requirements of the Fair Labor Standards Act under 29 U.S.C. § 213(b)(10)(A), which provides an exemption for "any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles [or] trucks."

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IDENTITY AND INTEREST OF AMICI CURIAE

The National Automobile Dealers Association (NADA), and nine state motor vehicle dealers associations for states in the Ninth Circuit (the "State Dealers Associations"), respectfully submit this brief amicus curiae in support of Petitioner Encino Motorcars, LLC.[1] Amicus curiae are 501(c)(6) non-profit trade associations representing franchised automobile and truck dealerships nationally and in each of the states comprising the Ninth Circuit, whose members are significantly impacted by the Ninth Circuit's decision, and as such, have a keen interest in the issues presented.

National Automobile Dealers Association

NADA is a national non-profit trade organization, incorporated in the State of Delaware. Founded in 1917, NADA serves and represents franchised new motor vehicle[2] dealers nationwide. Its members sell new motor vehicles and related goods and services as authorized dealers of various

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[1] Pursuant to this Court's Rule 37.3(a), all parties have consented to the filing of this brief. Counsel of record for both Petitioner and Respondent received notice at least ten days prior to the due date of this brief of Amici's intention to file an amicus brief. Pursuant to Rule 37.6, Amici Curiae affirm that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amici curiae, their members, or their counsel made a monetary contribution to its preparation or submission.

[2] Amici's members are comprised of both automobile and truck dealerships, referred to collectively in this brief as "motor vehicle dealerships."

motor vehicle manufacturers and distributors doing business in the United States. There are more than 18,000 franchised motor vehicle dealerships in the United States. Of those, more than 16,000 are members of NADA. As an organization, NADA informs members about relevant legal and regulatory issues and closely monitors federal statutes, state statutes, and court rulings interpreting such laws. NADA appears before and submits briefs to courts and other tribunals as amicus curiae to advocate interpretations of federal and state statutes that will advance the interests of its members as a group.

State Dealers Associations

The following State Dealers Associations join as amici in this brief: Alaska Automobile Dealers Association; Arizona Automobile Dealers Association; California New Car Dealers Association; Hawaii Automobile Dealers Association; Idaho Automobile Dealers Association; Montana Automobile Dealers Association; Nevada Franchised Auto Dealers Association; Oregon Automobile Dealers Association; and Washington State Auto Dealers Association. Each is a registered non-profit trade organization, representing new car and truck dealerships in the state. Collectively, the State Dealers Associations represent 90% of the more than 2,500 dealerships in the nine states comprising the Ninth Circuit. Their members are franchised retail sellers of new motor vehicles and related goods and services, serving as authorized dealers for motor vehicle manufacturers and distributors.

Each State Dealers Association provides services to its members on a state-wide basis, similar to those provided by NADA nationally. These services include informing members about relevant legal and regulatory issues and closely monitoring federal statutes, state statutes, and court rulings interpreting such laws. Each of the State Dealers Associations appears before and submits briefs to courts and other tribunals as amicus curiae to advocate interpretations of federal and state statutes that will advance the interests of its members as a group.

This case raises issues of immense practical significance to amici and their dealership members. The Ninth Circuit's decision, if allowed to stand, will have an adverse impact on all franchised motor vehicle dealers nationally, as it forecloses the availability of an overtime exemption on which dealerships and their employees have relied in structuring their compensation plans for more than 40 years.

INTRODUCTION AND SUMMARY OF ARGUMENT

For more than 40 years, the nation's motor vehicle dealerships have relied on the overtime exemption in section 13(b)(10) of Fair Labor Standards Act (FLSA) for "any salesman . . . primarily engaged in selling or servicing automobiles or trucks" in classifying and compensating their Service Advisors.[3] The exemption has allowed dealerships to compensate Service Advisors – who are engaged in the sale of service solutions to dealership customers – based substantially on their sales productivity rather than on the number of hours they work. These compensation arrangements benefit both dealerships and employees, and Service Advisors are generally well paid for their contributions to dealership revenues.

Dealerships have relied not only on the statutory language of the exemption, but as important, on a solid wall of judicial authority interpreting its scope. Until the Ninth Circuit's decisions in this case, every federal and state court, including several circuit courts of appeals, held that that the statutory exemption encompasses Service Advisors.

The Ninth Circuit's decision rejecting the applicability of the exemption to these well

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[3] We use the generic title "Service Advisor," but the position is also known as Service Writer or Service Salesman, among other titles.

compensated employees is an outlier, threatening to disrupt what was previously a settled, widely accepted compensation practice in the nation's franchised motor vehicle dealerships.

The impact of the Ninth Circuit's decision cannot be overstated. Every franchised dealership across the country operates a service department that employs Service Advisors.[4] Franchised automobile and truck dealerships (*i.e.*, motor vehicle dealerships) nationwide together employ more than 100,000 Service Advisors,[5] the vast majority of whom are classified as overtime-exempt, typically under section 13(b)(10). The Ninth Circuit's decision invalidates the longstanding practice of classifying Service Advisors under this statutory exemption within the Ninth Circuit and creates significant uncertainty about Service Advisors' exempt status nationwide, raising the specter of unanticipated

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[4] On average, light-duty automobile dealerships employ an estimated 5.7 Service Advisors each. National Automobile Dealers Assn., *NADA Data 2016: Annual Financial Profile of America's Franchised New-Car Dealerships* (2016) ("*2016 NADA Data*"). Commercial truck dealerships employ an estimated 3.5 Service Advisors each. National Automobile Dealers Assn., *ATD Data 2016: Annual Financial Profile of America's Franchised New-Truck Dealerships* ("*2016 ATD Data*").

[5] In amicus briefs filed by amici the last time this case came before this Court, NADA estimated that 45,000 Service Advisors were employed in dealerships nationwide. Based on a new review by expert data analysts and data collected for the *2016 NADA Data* and *2016 ATD Data* reports, cited above, NADA has concluded that is previous estimate significantly understated the actual number of Service Advisors employed nationally.

liability for past pay practices and windfalls to these well compensated sales employees. If allowed to stand, the decision below will cause disruption and upheaval to dealerships and employees alike, because it will force dealerships to restructure Service Advisors' compensation to avoid that liability going forward.

Certiorari is clearly warranted to resolve the circuit split on this issue and to clarify the scope of this key exemption for the nation's motor vehicle dealerships.

ARGUMENT

I. Service Advisors Are Key Contributors to the Revenues of Franchised Motor Vehicle Dealerships, and Have Been Classified as Exempt Sales Employees for Four Decades.

There are more than 18,000 franchised motor vehicle dealerships in the United States, the great majority of which are represented by amici. Nationally, franchised dealerships together employ an estimated 1.2 million people and have an estimated annual payroll of nearly $70 billion.[6] At the same time, the overwhelming majority are small businesses as defined by the Small Business Administration.

Every franchised motor vehicle dealership in the country has a service department. Service departments provide expert vehicle maintenance

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[6] *2016 NADA Data* at 33, 35; *2016 ATD Data* at 6, 16.

and repair services to dealership customers, and are a key revenue and profit center for dealerships. No position is more crucial to the vehicle service function than the Service Advisor. Service Advisors evaluate customers' service and repair needs, help diagnose mechanical problems, advise customers about services to address specific problems, provide information about optional and supplemental services, work intimately with dealership mechanics, and ensure the customer is satisfied with the service received. In short, Service Advisors are engaged in selling service, maintenance and repairs through the customer relationships they cultivate on a day-to-day basis. They are quite simply indispensable to the servicing of automobiles and trucks at dealerships.

NADA estimates that 100,000 Service Advisors are employed in franchised dealerships across the United States. According to compensation data compiled by NADA, Service Advisors are well compensated. In 2015 the average annual compensation for Service Advisors employed in automobile dealerships nationwide was $64,635, with the top 10% earning on average more than $97,335 per year.[7] Compensation levels are higher at automobile dealerships in the Ninth Circuit states (Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon and Washington), where

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[7] National Automobile Dealers Assn., *2016 Dealership Workforce Study: Automotive Retail National & Regional Trends in Compensation, Benefits & Retention* (NADA 2016) (hereafter "*NADA 2016 Workforce Study*") at 11. The top 10% compensation figure is based on NADA's unpublished analysis of 2015 data collected for the *2016 Workforce Study*.

the annual average is $68,995, and the top 10% earn on average $103,560 per year.[8]

Service Advisors are universally classified as exempt from overtime, typically under section 13(b)(10) of the FLSA, which exempts "salesmen . . . primarily engaged in selling or servicing automobiles or trucks."[9] The 13(b)(10) exemption requires nothing other than that the employee work in a sales or servicing role at the dealership. It thus provides flexibility in terms of compensation structure and level, including arrangements that involve a generous and predictable base wage combined with the option for incentive pay as an upside to sales productivity.

II. For More Than 40 Years, Motor Vehicle Dealerships Have Relied on Authoritative Interpretations of the Section 13(b)(10) Exemption in Classifying and Compensating Their Service Advisors.

Because of the importance of the 13(b)(10) exemption to franchised dealerships, in the 40-plus years since the exemption was enacted, amici have closely tracked judicial and agency interpretations addressing its meaning and scope. Until the Ninth Circuit's 2015 and 2017 decisions in this case, federal and state courts had uniformly interpreted the exemption to encompass Service Advisors. Looking to the language of the statutory exemption

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[8] Unpublished NADA analysis of 2015 data collected for *2016 Workforce Study*.

[9] 29 U.S.C. § 213(b)(10).

itself, these courts uniformly rejected DOL's 1970 interpretive guidance that Service Advisors did not fall within the section 13(b)(10) exemption. For some 40 years, the DOL acquiesced in these judicial decisions. And based on that consistent, authoritative interpretation, for the last 40 years amici have advised their members that Service Advisors qualify for the section 13(b)(1) exemption and need not be paid overtime. Amici's member dealerships have entered into countless compensation arrangements with their Service Advisors based on this settled understanding of the law.

The section 13(b)(10) exemption was originally enacted in 1966.[10] In 1970, the DOL promulgated interpretive regulations that ignored the literal language of the statute and narrowed the exemption by defining "salesman" as "an employee who is employed for the purposes of and is primarily engaged in making sales or obtaining orders or contracts for sale of [vehicles]."[11] Indeed, the regulation went on to explicitly *exclude* Service Advisors from the exemption, although recognizing that their principle functions included "diagnosing the mechanical problems of vehicles brought in for repair, . . . and directing and checking on the work of mechanics."[12]

In the litigation that inevitably followed, the DOL's 1970 interpretive guidance was soundly and

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[10] Pub. L. No. 89-601, 80 Stat. 830 (1966).
[11] 29 C.F.R. § 779.372(c)(1) (1971).
[12] *Id.* § 779.372(c)(4).

consistently rejected by the courts. Beginning with the 1973 decision of the Fifth Circuit in *Brennan v. Deel Motors, Inc.*,[13] and up until the Ninth Circuit's 2015 decision in this case, the decisions of federal circuit courts,[14] federal district courts,[15] and state courts[16] uniformly held that Service Advisors are covered by the exemption.

In the face of consistent judicial rejection of its 1970 interpretive regulation, the DOL acquiesced to the courts' interpretation. In 1978 it rescinded its regulatory guidance, issuing an Administrator Opinion squarely declaring that "service writers, service advisors, service managers, or service salesmen" qualify as "salesmen" for purposes of the exemption, and are exempt when the majority of their sales in dollar volume is for non-warranty work.[17] In 1987, the DOL revised its enforcement

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[13] 475 F.2d 1095 (5th Cir. 1973).

[14] *Deel Motors*, 475 F.2d 1095; *Walton v. Greenbrier Ford, Inc.*, 370 F.3d, 446 (4th Cir. 2004); *see Bonner v. City of Prichard*, 661 F.2d 1206 (11th Cir. 1981) (adopting 5th Circuit decisions prior to 9/30/81 as controlling precedent).

[15] *Clark & Day v. Palmen Motors*. No. 98-C-0548 (E.D. Wisc. 1988); *Dayton v. Coral Oldsmobile, Inc.*, 684 F. Supp. 290 (S.D. Fla. 1988); *Yenney v. Cass County Motors*, No. 76-0-294, 1977 WL 1678 (D. Neb. Feb. 8, 1977); *Brennan v. Import Volkswagen, Inc.*, No. W-4982, 1975 WL 1248 (D. Kan. Oct. 21, 1975); *Brennan v. North Bros. Ford, Inc.*, No. 40344, 1975 WL 1074 (E.D. Mich. Apr. 17, 1975), *aff'd sub nom., Dunlop v. North Bros. Ford. Inc.*, 529 F.2d 524 (6th Cir. 1976) (Table).

[16] *Thompson v. J.C. Billion, Inc.*, 368 Mont. 299 (Mont. 2013).

[17] U.S. Dep't of Labor, Wage & Hour Op. Ltr. WH-467, 1978 WL 51403 (July 28, 1978).

bible, the Wage & Hour Field Operations Handbook (FOH), to reflect that opinion and to incorporate the judicial authority on which it was based.[18] The FOH noted the DOL's intention to revise its regulations at 29 C.F.R. section 779.372 "as soon as is practicable" to reflect the judicial interpretation of the exemption.

Ten years later, in 2008, the DOL issued proposed regulations to formally codify the judicial interpretations of the section 13(b)(10) exemption as encompassing Service Advisors and confirming the agency's acquiescence to these interpretations over the previous three decades.[19] In 2011, however, the DOL abruptly reversed course, issuing a Final Rule that reneged on its long-held position and 2008 proposal and revived its judicially-rejected 1970 position that the exemption covers only those dealership salesmen who sell vehicles.[20]

III. Litigation Arising from the DOL's Final Rule Has Created Uncertainty and Opened an Entire Industry to Unanticipated Liabilities.

The 2011 Final Rule began the current era of uncertainty for franchised motor vehicle dealerships nationwide. Litigation was inevitable and not long in coming. In 2012, the year after the Final Rule was

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[18] U. S. Dep't of Labor, Wage & Hour Div., *Field Ops. Handbook* § 24L04(k) (October 20, 1987).

[19] 73 Fed. Reg. 49621, 43659, 43671 (July 28, 2008).

[20] *See* Updating Regulations Issued under the FLSA, 76 Fed. Reg. 18832, 18859 (Apr. 5, 2011).

promulgated, the plaintiff Service Advisors in this case filed their challenge to their classification under the section 13(b)(1) exemption. The District Court refused to defer to the DOL's new position, rejecting it as inconsistent with the statutory language and Congressional intent.[21] The Ninth Circuit reversed, deferring to the agency's 2011 interpretation.[22] This Court granted certiorari and in a 2016 opinion vacated the Ninth Circuit's decision, holding that it had erred in placing controlling weight on the DOL's 2011 Final Rule. No deference was owed to the DOL's new interpretation, this Court held, in part because in adopting it, the DOL had disregarded "decades of industry reliance on the Department's prior policy" in "negotiat[ing] and structur[ing] their compensation plans."[23]

On remand, the Ninth Circuit affirmed its original opinion that Service Advisors are not encompassed within the section 13(b)(10) exemption, this time avoiding reference to the DOL's 2011 interpretive regulation. The Ninth Circuit rejected a literal reading of the statute, which it admitted would encompass Service Advisors, as inconsistent with Congressional intent. Nowhere did the court mention, much less consider, the reliance interests of an entire industry on 40 years of consistent judicial and agency authority, despite this Court's extensive discussion of reliance interests in its previous opinion in this case. Instead, the Ninth Circuit simply stated that it disagreed with the decisions of

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[21] Pet.App.83.

[22] Pet.App.55-73.

[23] Pet.App.42.

its sister circuits "for the reasons stated in our earlier opinion (except those reasons concerning deference to the agency)."[24] The Ninth Circuit's most recent decision thus perpetuates the circuit split that previously led this Court to grant certiorari, and exacerbates the resulting uncertainty for more than 18,000 motor vehicle dealerships across the country. This untenable state of affairs can only be resolved by this Court.

IV. The Ninth Circuit's Decision Creates Unanticipated Liabilities and Future Uncertainties for the Nation's Motor Vehicle Dealerships and Threatens to Disrupt Longstanding Compensation Arrangements.

Based on the consistent authoritative interpretations of the section 13(b)(10) exemption over the last 40 years, amici NADA and State Automobile Dealers Associations have long advised their members that Service Advisors are encompassed within the FLSA's 13(b)(10) exemption. In turn, automobile dealerships across the country have relied on that advice to structure their compensation and recordkeeping practices accordingly. The Ninth Circuit's decision, if allowed to stand, would upend these longstanding industry practices and potentially create unanticipated retroactive liability for past practices. At a minimum, the decision below would lead to widespread disruption for motor vehicle dealerships. The impact of this decision in the real world of brick-and-mortar dealerships cannot be overstated.

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[24] Pet.App.30.

This is particularly true for dealerships within the Ninth Circuit. There are more than 2,500 dealerships in the nine states comprising the Circuit. As a result of the Ninth Circuit's decision, dealerships in these states that have relied solely on the 13(b)(10) exemption in classifying and compensating their Service Advisors now face unanticipated overtime liability. In making the exemption unavailable, the decision puts these dealerships at risk for private FLSA back pay claims.

The impact of the decision below will be felt outside of the Ninth Circuit as well. Multi-state dealerships with operations within and outside of the Ninth Circuit – of which there are many – could be particularly hard-hit by national FLSA collective action litigation filed in Ninth Circuit district courts. The Circuit's outlier decision is sure to encourage such forum shopping. But even dealerships without operations in the Circuit will feel the decision's impact, as it will all-too-predictably inspire fresh challenges to exempt status in jurisdictions without controlling circuit precedent.

The uncertainty and impetus to forum shop arising from the circuit split can only be resolved by a grant of certiorari and reversal of the decision below. And without a reversal by this Court, dealerships both within and outside of the Ninth Circuit that have relied on the section 13(b)(10) exemption in classifying their Service Advisors will face unanticipated liability for past violations, which at the time were not considered violations at all. If the exemption is foreclosed, these dealerships will be

subject to private FLSA back pay claims and significant potential liability, given that the national average workweek for Service Advisors is about 45 hours.[25] In addition to unpaid overtime liability for about five hours per week for each Service Advisor going back up to three years, dealerships could face liability for liquidated damages equal to unpaid overtime, interest and attorney's fees.[26] Potential liability across the industry could swiftly approach many hundreds of millions of dollars.

This specter is very real. Contrary to the previous "no-big-deal" arguments made by Respondents the last time this issue came before this Court, the FLSA's section 7(i) exemption for certain commissioned employees will be unavailable to a significant portion of the nation's dealerships with respect to past liability. That exemption has multiple technical requirements concerning type of business, compensation structure and hourly wage average, each of which must be satisfied.[27] Heretofore, dealerships have had no need to consider these requirements in structuring their pay and

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[25] *NADA 2016 Workforce Study* at 115. These weekly hours are consistent with the hours worked by exempt vehicle salespersons. *Id.*

[26] 29 U.S.C. § 216(b).

[27] The section 7(i) exemption applies only to employees who (i) work in retail or service establishments; (ii) earn more than 1.5 times the minimum wage for all hours worked; and (iii) are paid commissions that comprise more than 50% of total compensation. 29 U.S.C. § 207(i); *see Gieg v. DRR, Inc.*, 407 F.3d 1038, 1044-47 (9th Cir. 2005).

timekeeping practices due to the simplicity of section 13(b)(10), which has no such technical requirements.

The section 7(i) exemption, for example, is not available to dealerships whose compensation plans have been structured to provide more generous base compensation in comparison to commissions. And it will be difficult to establish for those dealerships that did not keep time records showing that their Service Advisors' average hourly compensation meets the 7(i) requirement of exceeding 1.5 times the minimum wage for each and every hour worked. Finally, the section 7(i) exemption is not available to dealerships that do not qualify as "retail establishments" due to their mix of revenue sources, when over 25% of revenues comes from non-retail sales, such wholesale fleet sales.

The uncertainty spawned by the Ninth Circuit's decision will also have potential impacts on employees themselves, as dealerships begin radically restructuring previously agreed-upon compensation arrangements to avoid future liability. Many, at least those who qualify as retail establishments, may restructure Service Advisor compensation to allocate a greater proportion to commissions in an attempt to meet the 7(i) exemption, thus placing more wages at risk, a disadvantage to employees in lean economic times. Others will put Service Advisors on an hourly pay plan, paying overtime but lowering or even doing away with commissions, thus eliminating some or all of the upside advantage provided to employees through performance-based commission systems. There is nothing more disruptive to an employee than changing her

compensation plan, even when the result is that her net income is roughly equivalent or even greater.

Unless resolved by this Court, the circuit split spawned by the Ninth Circuit's decision will continue to engender uncertainty. Unless reversed, the decision will create significant unanticipated liability for dealerships that have relied on the section 13(b)(10) exemption in the past. The disruption will extend to Service Advisors themselves going forward, who will find their compensation plans changed in ways that may not ultimately benefit them.

V. The Petition for Certiorari Should Be Granted Because the Decision Creates a Conflict with Every Other Circuit as to the Scope of the Section 13(b)(10) Exemption.

Given the substantial questions about the correctness of the Ninth Circuit's decision, and the negative impact of the uncertainty it creates on motor vehicle dealerships nationally, the petition should be granted to resolve a conflict among the circuits on an important matter.

Only a grant of certiorari and resolution by this Court can avoid the inequity that a circuit conflict creates, because until then, the parties' rights and duties depend upon where a case is litigated. And left unresolved, circuit conflicts feed on themselves, generating additional litigation in the other circuits.

The Ninth Circuit's decision conflicts with the decisions of all of the circuits that have considered the applicability of the section 13(b)(10) exemption to service providers: the Fifth Circuit's decision in *Brennan v. Deel Motors, Inc.*,[28] the Fourth Circuit's decision in *Walton v. Greenbrier Ford, Inc.*,[29] and the Eleventh Circuit's adoption of the *Deel Motors* decision pursuant to *Bonner v. City of Prichard*.[30] It also conflicts with the numerous federal district and state appellate court decisions in these and other circuits, including the Montana Supreme Court's *Thompson v. J.C. Billion*[31] decision. Indeed, the Ninth Circuit stands alone in holding that Service Advisors are not encompassed within the section 13(b)(10) exemption as a matter of law.

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[28] 475 F.2d 1095.

[29] 370 F.3d, 446 (4th Cir. 2004).

[30] 661 F.2d 1206 (11th Cir. 1981) (adopting 5th Circuit decision prior to 9/30/81 as controlling precedent).

[31] 368 Mont. 299.

CONCLUSION

The nation's motor vehicle dealerships have relied on more than four decades of settled law in structuring their compensation arrangements with Service Advisors. The Ninth Circuit's decision not only calls the legality of these arrangements into question, it also creates a conflict with every other circuit to have addressed the section 13(b)(1) exemption for Service Advisors. Given the national scope of the issue, and the many inequities and disruptions resulting from the circuit conflict, certiorari is both appropriate and necessary. Amici curiae urge the Court to grant Petitioner Encino Motorcars' Petition for Certiorari.

Respectfully submitted,

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